

**COURT OF COMMON PLEAS
FOR THE STATE OF DELAWARE**
WILMINGTON, DELAWARE 19801

John K. Welch
Judge

March 8, 2010

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Re: *State of Delaware v. Kurt Linnemann*
Case Nos.: 0908020309 & 0908020319

Date Submitted: February 4, 2010
Date Decided: March 8, 2010

LETTER OPINION

Dear Counsel:

Trial in the above captioned matter took place on Thursday, February 4, 2010 in the Court of Common Pleas, New Castle County, State of Delaware.¹ Following receipt of documentary evidence and sworn testimony the Court reserved decision. This is the Court's Final Decision and Order.

Kurt Linnemann (hereinafter "Linnemann") was charged with two Counts of Harassment allegedly in violation of Title 11, section 1311 of the Delaware Code. Linnemann was also charged with one Count of Offensive Touching allegedly in violation of Title 11, section 601 of the Delaware Code. According to the Information filed by the Attorney General with the Clerk of the Court, the defendant "[d]id with intent to harass, annoy or alarm Henry R. Wolfe, did engage in any course of alarming or distressing conduct in a manner which knows is likely to provoke a

¹ While originally scheduled for a jury trial, the defendant entered a signed waiver to the Clerk of the Court to the Bench

violent or disorderly response or cause a reasonable person to suffer annoyance or alarm;” “[d]id with intent to harass, annoy or alarm Kaitlyn Wolfe, did engage in any course of alarming or distressing conduct in a manner which knows is likely to provoke a violent or disorderly response or cause a reasonable person to suffer annoyance or alarm;” and “[d]id intentionally touch Henry R. Wolfe, either with a member of his body or with any instrument, knowing that he was thereby likely to cause offense or alarm to that person.”

After trial, the Court ordered counsel to file cross-memoranda within fifteen (15) days to address the limited issue of First Amendment rights and free speech with respect to the harassment counts under 11 *Del. C.* §1311. On February 22, 2010, the State notified the Court that after reviewing relevant case law and facts it decided to enter a *nolle prosequi* on both counts of harassment. The Court interprets this as a Motion to Dismiss, with prejudice. Thus, the sole issue before the Court is the charge of Offensive Touching under 11 *Del. C.* §601.

(I) The Facts

On August 22, 2009, at 7:30am Henry R. Wolfe (hereinafter “Henry”) drove his daughter, Kaitlyn Wolfe (hereinafter “Kaitlyn”), to Planned Parenthood at 625 Shipley Street, Wilmington, Delaware, 19802. The purpose of their visit was so Kaitlyn could attend a follow up appointment for an abortion she had received earlier that week.

When the Wolfe’s arrived at Planned Parenthood they parked on Shipley Street. Henry immediately noticed Linnemann walking briskly towards their vehicle, carrying a large wooden sign. Printed on the sign was a picture of an aborted fetus. Linnemann approached the passenger side of the vehicle, blocking Kaitlyn’s exit. Henry told his daughter not to exit the vehicle, and

stepped out of the car. Kaitlyn ignored her fathers' instruction and exited the vehicle. Linnemann began verbally accosting Kaitlyn. He called her a "baby killer" and "bad mother."²

As soon as Linnemann began his verbal barrage, Henry told him to leave his daughter alone. Linnemann refused to comply with this request and continued attempting to speak with Kaitlyn. Henry testified at trial that he was concerned because Linnemann was a very large man, Kaitlyn a very small woman, Linnemann was carrying a five (5) foot tall wooden sign, and Linnemanns physical demeanor was "aggressive." Henry interposed himself between Linnemann and Kaitlyn in an attempt to protect his daughter. He remained in between Linnemann and Kaitlyn until she entered Planned Parenthood.

As Kaitlyn was attempting to enter Planned Parenthood, Henry and Linnemann physically engaged one another. Linnemann was attempting to continue to communicate his message to Kaitlyn, while Henry was attempting to block his path. They were merely pushing and shoving each other through the wooden sign, which Linnemann was holding between them. At no point were open or closed fist punches thrown by either Linnemann or Henry. After Kaitlyn entered Planned Parenthood the altercation ended, and Henry followed his daughter inside.

Linnemann then called the police. When they arrived, he told the officers that he wanted to press charges against Henry for Assault. At trial, Henry testified that he did not call the police because, "the situation was over...I did not feel comfortable with either my or Mr. Linnemanns actions...we both acted like children." Henry also testified that Officers instructed him that if he went to Court that day, signed an affidavit, and pressed charges, that the Assault charge against him would be dropped. At trial, Henry testified that he filed the instant charges solely to avoid the Assault charge against him.

² Linnemann also said "there are other options" and "your baby is saying 'mommy mommy, don't kill me.'"

(II) The Law

Title 11, Section 601 of the Delaware Code provides as follows:

“(a) A person is guilty of offensive touching when the person:

(1) Intentionally touches another person either with a member of his or her body or with any instrument, knowing that the person is thereby likely to cause offense or alarm to such other person.”

In order to find the Defendant guilty of Offensive Touching, the State must prove each of the following elements beyond a reasonable doubt: (1) the defendant touched another person, the alleged victim, with a member of his body or other instrument; (2) the defendant did so intentionally, that is, it was the defendants conscious object or purpose to touch the other person in the manner in which the act was done; and (3) the defendant knew or was aware that he was thereby likely to cause offense or alarm to the other person. The question whether a person knows that he is likely to cause offense or alarm requires an examination of all the circumstances, including the victim’s state of mind. *Blaschowitz v. Pennington*, 1987 Del. Ch. LEXIS 401. The ultimate conclusion as to the character of the act may be reached without considering the quality of the victims or acts. *Blaschowitz*, 1987 LEXIS at 401.

In the instant case, the State has the burden of proving each and every element of the charging document beyond a reasonable doubt. 11 *Del. C.* § 301; *State v. Matushefske*, Del. Supr., 215 A.2d 443 (1965).

As established case law indicates, a reasonable doubt is not a vague, whimsical or merely possible doubt, “but such a doubt is intelligent, reasonable, and impartial men may honestly entertain after a conscious consideration of the case. *Matushefske*, 215 A.2d at 445.

The State also has a burden of proof beyond a reasonable doubt that jurisdiction and venue have been proven as elements of the offense. 11 *Del. C.* § 232; *James v. State*, Del. Supr., 377 A.2d 15 (1977); *Thornton v. State*, Del. Supr., 405 A.2d 126 (1979).

In determining whether the State has met its burden of proving each and every element of the offense beyond a reasonable doubt as required by 11 *Del. C.* § 301, the Court may consider all direct and circumstantial evidence.

(III) Opinion and Order

There was insufficient evidence presented at trial to prove each and every element of the charge of offensive touching beyond a reasonable doubt. Almost all of the evidence presented at trial was focused on proof of the Harassment charges. It is unclear to the Court from the *de minimis* evidence in the record whether Linnemann or Henry initiated the altercation, whether it was Linnemann's conscious object or purpose to touch Henry with the sign, and whether Linnemann knew he was likely to cause offense or alarm to Henry.

It is entirely unclear from the minimal evidence in the record whether Linnemann or Henry initiated the physical altercation. It is also unclear whether it was Linnemann's conscious object or purpose to touch Henry through the sign. Linnemann repeatedly testified at trial that his only desire was to communicate his pro-life message to Kaitlyn, not to touch Henry in any way. Finally, it is arguable at best whether Linnemann knew he was likely to cause offense or alarm to Henry. Henry testified at trial that both men "acted like children" and that the only reason he filed the instant charges was to avoid the assault charges Linnemann had made with the police at the scene, not because he felt any offense or alarm whatsoever. Given this vague evidence, it is clear that the State has failed to meet its burden to prove all elements of the charge of Offensive Touching beyond a reasonable doubt.

Therefore, the Court must conclude as a matter of law that the State has not met its burden to prove the instant charge beyond a reasonable doubt. Based upon the entire record, including all direct and circumstantial evidence, the Court finds the defendant NOT GUILTY of the charge of Offensive Touching.

IT IS SO ORDERED this 8th day of March, 2010

John K. Welch
Judge

/gs.jb

Cc: Juanette West, Scheduling Supervisor
CCP, Criminal Division